Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

CAMPAIGN FOR RATEPAYERS RIGHTS
&
N.H. PUBLIC INTEREST RESEARCH GROUP,
Petitioners,

v.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
&
THE STATE OF NEW HAMPSHIRE,
Respondents.

On Petition for a Writ of Certiorari to the
New Hampshire Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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April 16, 2001

35 pp

QUESTION PRESENTED

Public Service of New Hampshire (PSNH) is the former integrated utility company which served about three-quarters of New Hampshire's electricity users before deregulation. Restructuring of the electric industry means that while PSNH retains its monopoly in transmission of power to users, the generation of electricity is now an open market enterprise. Nonetheless, New Hampshire's deregulation statute requires that, no matter where power is purchased, the customer is compelled to pay a portion of the purchase price to PSNH, a portion beyond the cost of transmission, in order to cover the expense of PSNH's own generation assets.

The question presented here is:

> Whether, in a deregulated environment, it is an unconstitutional taking for the State to exact monies on behalf of PSNH for electricity generated by, and purchased from, its free market competitors.

PARTIES TO THE PROCEEDING

The Campaign for Ratepayers Rights (CRR) is a non-profit association organized in the State of New Hampshire. It is not affiliated with any other organization.

The New Hampshire Public Interest Research Group (NHPIRG) is a non-profit association organized in the State of New Hampshire. It is affiliated with USPIRG, and with PIRGs which exist in other states.[1]

Other parties are the State of New Hampshire, Public Service Company of New Hampshire (PSNH), and the Granite State Taxpayers Association (GST).

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[1]The New Hampshire Supreme Court did not mention NHPIRG in its opinion. CRR and NHPIRG, with the consent of all other parties, have accordingly filed a request for its name to be added to the caption. The motion is pending.

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PETITION FOR A WRIT OF CERTIORARI

The Campaign for Ratepayers Rights (CRR) and the New Hampshire Public Interest Research Group (NHPIRG) respectfully petition for a writ of certiorari to review the judgment of the New Hampshire Supreme Court in this case.

REPORT OF OPINION

On January 16, 2001, the New Hampshire Supreme Court rendered an opinion in this case. *Appeal of Campaign for Ratepayers Rights & a.*, __ N.H. __, 766 A.2d 702 (2001). It is reprinted in the Appendix hereto.[2] The issue for which the petitioners seek certiorari is contained in section I ("Constitutional Claims") of the opinion.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISIONS

The United States Constitution,[3] Amendment V, provides: "nor shall private property be taken for public use, without just compensation."

The United States Constitution, Amendment XIV, provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

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[2]On January 26, 2001, GST filed a Motion for Reconsideration, to which neither CRR nor NHPIRG were a party. It was denied via a one-sentence order by the New Hampshire Supreme Court on January 31, 2001. Because neither it nor the date of its issuance is relied on here, neither the motion nor its denial is included in the appendix hereto.

[3]The New Hampshire Supreme Court did not cite the federal constitution in its opinion. CRR and NHPIRG have accordingly filed a request in the New Hampshire Supreme Court for a certificate of preservation. The filing, which is currently pending, is appended hereto.

STATEMENT OF THE CASE

Takings must be compensated. Under New Hampshire electricity deregulation, however, when a buyer enters a contract with an electricity supply company, a portion of the negotiated price is paid to Public Service Company of New Hampshire (PSNH), even though no power is purchased from it. Thus the buyer makes a forced uncompensated payment to a private party – a taking.

How New Hampshire arrived at this spot, and why it involves $2 billion, is a long and colorful story, only a few highlights of which are necessary here.

I. Seabrook Fiasco

In 1972, PSNH, then a small utility in a small state, announced it would build two large nuclear reactors at Seabrook, New Hampshire, for an estimated cost of $973 million. In the late 1970s there were large demonstrations at the site and thousands of arrests. By that time the cost estimates had risen to $2 billion, so PSNH sought creative ways to finance the plant. After a gubernatorial election that turned on the issue, PSNH was not allowed to pay for construction out of current rates; subsequently PSNH sold part of its share in the project to other utilities. In the mid-1980s, after a series of financing crises and an ever-increasing cost estimate that reached $10 billion, lenders closed off PSNH's access to credit. With bankruptcy looming, PSNH suspended all construction of Seabrook, and eventually canceled one-half the project. In 1985, PSNH entered the junk bond market, selling bonds at an annual financing cost in excess of 22 percent. PSNH became, in 1988, the first post-depression utility to go bankrupt; it emerged only after being acquired by Northeast Utilities (NU) of Connecticut. To cover the cost of the $2.3 billion deal, the State of New Hampshire entered a "rate agreement" with NU, committing those living in PSNH's service territory to seven

years of 5.5% annual rate increases. In 1990, Seabrook unit 1 finally entered commercial service at a cost of $6.9 billion.

II. Electric Restructuring in New Hampshire

By the late 1990s, the compounded rate increases drove New Hampshire electric rates to among the highest in the nation. With the seven-year rate agreement expiring, the New Hampshire Legislature began the process of deregulating the electric market. A 1996 pilot program allowed nearly 17,000 New Hampshire residents to become the first people in the country with freedom to chose their electricity provider. It lead to a generalized legislative restructuring of the industry, principally by segregating PSNH's generation assets from its transmission wires, thus allowing for an open market in electric generation. The law's purpose was to "harness the power of competitive markets" in order to reduce costs. The law eliminated PSNH's obligation to provide generation as of the date competition begins ("C-day"), and also recognized that electric generation in New Hampshire is no longer a regulated monopoly. PSNH was allowed to recoup a portion of its "stranded costs," poor investments in generation which it otherwise wouldn't be expected to recover in a competitive market. N.H. REV. STAT. ANN. § 374-F.

In 1997 the New Hampshire Public Utilities Commission (PUC) published its order implementing electric competition, and allowing PSNH to recoup about 60% of its claimed $2 billion in stranded costs. PSNH immediately sought an injunction in federal court, and won a temporary restraining order barring implementation of the restructuring plan. The Court also issued preliminary rulings indicating it was likely to find that the PUC's restructuring order violated the 1989 rate agreement.

III. 1999 Settlement of PSNH's Lawsuit

With this background, in August 1999 the State of New Hampshire and PSNH entered a comprehensive settlement to PSNH's suit. Under the settlement, the State acknowledges PSNH's right to recover approximately $2 of stranded costs, consisting principally of: Seabrook costs deferred under the 1989 rate agreement; the Seabrook-related balance of the $800 million "acquisition premium" created under that agreement; and deferred costs of acquiring power from small energy producers, the price for which had been set excessively high to justify continuing with Seabrook construction.

For its part, PSNH will take a before-tax write-off of $367 million, but recover the balance of its claimed stranded costs in three "buckets." The first bucket contains the rate charges to recover the entire cost of the securitization bonds authorized by the legislature. These charges would have absolute priority and are to be paid first out of the stranded cost charges. The second bucket includes both the cost of Seabrook decommissioning, estimated at $585 million in year 2000 dollars, and costs for obtaining power from small power producers not recovered through current rates. The third bucket comprises all other stranded costs.

IV. Stranded Cost Recovery Charge

All these costs add up to an average stranded cost recovery charge (SCRC) of 3.4 cents per KWH for all consumers in PSNH's former service territory. The SCRC is a surcharge added to electric bills to pay for the stranded costs flowing largely from the Seabrook fiasco. Even if one buys power from another electricity provider, the SCRC is added to the consumer's bill, and must be paid to PSNH as a condition of buying any power at all. A person can avoid the SCRC only by "going off the grid," a practical option for very few. Because PSNH's stranded costs are, as a percentage of the company's

net worth, very high, its stranded cost charge is among the highest ever proposed, about one-third of a residential consumer's bill.

This appeal contests the constitutionality of the SCRC.

V. Litigation in New Hampshire Leading to this Petition

After the PUC approved the SCRC, the Campaign for Ratepayers Rights and the New Hampshire Public Interest Research Group filed a motion for rehearing in the PUC raising the takings issue on appeal here pursuant to both the New Hampshire and Federal Constitutions. On September 8, 2000, the PUC denied the motion. CRR and NHPIRG appealed to the New Hampshire Supreme Court. On January 16, 2001, New Hampshire's highest court affirmed the PUC's ruling that there was no unconstitutional taking.

REASONS FOR GRANTING THE WRIT

The Question Presented is Important to States Restructuring Their Monopoly Electricity Industries, and to Electric Consumers in Deregulated States

PSNH claims about $2 billion in stranded costs. Nationwide, about $202 billion of stranded costs are at stake in the state-by-state effort to restructure monopoly electric utilities, most stemming from costly or abandoned nuclear power plants. C. Seiple, *Stranded Investment*, 135 PUB.UTIL.FORT. 10 (Mar. 15, 1997)

Currently more than half the states have adopted retail competition, and all but a few of the rest are involved in electric industry restructuring efforts. *See* Department of Energy, *Status of State Electric Industry Restructuring Activity as of April 2001* <http://www.eia.doe.gov/cneaf/electricity/chg_str/regmap.html>.

Most employ a stranded cost recovery charge (SCRC) that works the same way as New Hampshire's, and that presents the same takings issue – a purchaser of electricity must pay the stranded costs of the former monopoly utility, even if the customer wishes to buy power from another generator.

Because the State of New Hampshire entered into the 1989 "rate agreement" with PSNH, the State probably owes PSNH stranded costs the company can claim under the agreement. States may satisfy their obligations by taxing their citizens, but the SCRC is not a tax – it is paid to a private entity and it is not universal. Rather the SCRC is a taking because it is "a law that takes property from A. and gives it to B." *Calder v. Bull*, 3 U.S. 386, 388 (1798).

Before deregulation, PSNH served about 70 percent of New Hampshire's consumers. If the State were to enact, for instance, a utility tax to cover its obligations to PSNH, the stranded cost burden on an individual PSNH customer would be reduced. Although the number of people bearing the burden of public obligations here is greater than in, say, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the principle is the same. Under the restructuring scheme, the State will meet its obligation to pay for PSNH's past poor generation decisions, but those paying get little benefit. Thus, the SCRC "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Certainly states have authority to legislate utility rates. But stopping the analysis there as did the New Hampshire Supreme Court, is mistakenly anachronistic. Electric power companies used to be monopolies. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989) ("utilities are virtually always public monopolies"). Delivery of electricity, because it involves wires and poles, is a "natural monopoly." The monopoly in

generation, however, sprung from the belief, well-founded a half-century ago, that only government or large integrated conglomerates protected by government could amass the capital necessary to build generation facilities. *See* Richard Rudolph and Scott Ridley, POWER STRUGGLE: THE HUNDRED YEAR WAR OVER ELECTRICITY (1986). But the last decade, which has brought both advances in technology allowing smaller and more diverse power sources, as well as development of financing vehicles capable of giving even small firms access to large-scale capital, has eliminated the need for generation monopolies in New Hampshire and elsewhere. Thus, upon industry restructuring, generation of electricity is merely another product in the commercial stream, and states may no longer rely on the existence of a monopoly, or other similar exigency, to justify regulation of its price. *See* Hugh Rockoff, DRASTIC MEASURES: A HISTORY OF WAGE AND PRICE CONTROLS IN THE UNITED STATES (1984).

Even in the monopolized electric generation context, ratepayers may only be forced to pay for that which has an "essential nexus" to a utility purpose, such as building infrastructure necessary for providing the utility service. *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470, 475 (1938). The SCRC serves no utility purpose because it does not purchase anything; it pays off old bad debts. Moreover, the SCRC must be paid over the course of many years, by all people in PSNH's former service territory, including those who move to New Hampshire after competition-day and who cannot possibly get a utility benefit from the charge.

Takings must be compensated. Under New Hampshire's deregulation scheme, however, when a consumer buys power from the supply company of her choice, a portion of the purchase price is nonetheless paid to PSNH. The consumer is thus forced to make payment to a private party, which is

uncompensated, and therefore unconstitutional.

If state governments view electric customers as captive fountains of cash who can be coerced into paying stranded costs to private firms, they have little incentive to pay close attention to the fairness of former utilities' stranded costs claims or the source of revenue to pay them. If the SCRC scheme is an unconstitutional taking of electric customers' money, however, the solution is taxation, and the states will watch the utilities' claims closely before committing themselves, by contract or legislation, to paying for companies' past poor generation decisions.

The importance for customers nationwide is that by artificially inflating their electric bill, the stranded cost recovery charge prevents them from taking full advantage of lower cost energy from alternative suppliers.

The only thing that distinguishes New Hampshire from other states is the magnitude of the stranded cost charge. New Hampshire's bungled nuclear experience, combined with its small population, makes the total dollars of stranded costs per person unusually high; high enough to spark litigation. But the issue is the same in all deregulating states.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully Submitted,

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April 16, 2001

APPENDIX

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Clerk/Reporter, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any errors in order that corrections may be made before the opinion goes to press. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: http://www.state.nh.us/courts/supreme.htm

THE SUPREME COURT OF NEW HAMPSHIRE

Public Utilities Commission

Nos. 00-637

00-638

APPEAL OF CAMPAIGN FOR RATEPAYERS RIGHTS & a.

January 16, 2001

Law Office of Joshua L. Gordon, of Concord (Joshua L. Gordon on the brief and orally), for Campaign for Ratepayers Rights.

Hall, Morse, Anderson, Miller & Spinella, PC, of Concord (Frank P. Spinella, Jr. on the brief and orally), for Granite State Taxpayers.

Sulloway & Hollis, P.L.L.C., of Concord (Martin L. Gross and Timothy A. Gudas on the brief, and Mr. Gross orally), and Robert A. Bersak, assistant general counsel of Public Service Company of New Hampshire, of Manchester, by brief, for Public Service Company of New Hampshire.

Philip T. McLaughlin, attorney general (Stephen J. Judge,

associate attorney general, and Wynn E. Arnold, senior assistant attorney general, on the brief, and Mr. Judge orally), and Foley, Hoag & Eliot, LLP, of Boston, Massachusetts (James K. Brown on the brief), for the State.

PER CURIAM. The petitioners, Campaign for Ratepayers Rights (CRR) and Granite State Taxpayers (GST), appeal an order of the New Hampshire Public Utilities Commission (PUC) approving a settlement agreement between the State and Public Service Company of New Hampshire (PSNH). We affirm.

This case has a long, complex history, which we do not repeat here. See In re N.H.P.U.C. Statewide Elec. Util. Restructuring Plan, 143 N.H. 233, 722 A.2d 483 (1998); Petition of Public Serv. Co. of N.H., 130 N.H. 265, 539 A.2d 263 (1988), appeal dismissed, 488 U.S. 1035 (1989); Appeal of Richards, 134 N.H. 148, 590 A.2d 586, cert. denied, 502 U.S. 899 (1991). We recite facts relevant to only the current appeal.

PSNH, the State's largest public utility, has historically provided electric generation, transmission, and distribution services to New Hampshire residents. See In re N.H.P.U.C., 143 N.H. at 234, 722 A.2d at 484. As such it has been a "vertically integrated" utility, providing all of these services as part of a "bundled" package.

In 1988, PSNH filed for bankruptcy, and in 1989, it entered into a rate agreement with the State that provided for fixed annual rate increases for seven years and permitted PSNH to include certain intangible deferred assets in its rates after the fixed rate period ended. See id. at 234-35, 722 A.2d at 484-85.

In 1996, the legislature enacted RSA chapter 374-F (the restructuring statute). See RSA 374-F:1, I (Supp. 2000). The restructuring statute directed the PUC to design a restructuring

plan "in which electric generation services and rates would be extracted from the traditional regulatory scheme, unbundled, and subjected to market competition." In re N.H.P.U.C., 143 N.H. at 236, 722 A.2d at 485. The goal of restructuring was to "create competitive markets that [would] produce lower prices for all customers than would have been paid under the [then-]current regulatory system." RSA 374-F:3, XI (Supp. 2000).

The PUC issued a final Statewide Restructuring Plan in 1997. See In re N.H.P.U.C., 143 N.H. at 236, 722 A.2d at 486. PSNH and its affiliates challenged the plan in federal court, asserting that it violated numerous federal statutory and constitutional provisions. See Public Service Co. of N.H. v. Patch, 962 F. Supp. 222 (D.N.H. 1997); Public Service Co. of New Hampshire v. Patch, 173 F.R.D. 17 (D.N.H. 1997); Public Service Co. of New Hampshire v. Patch, 136 F.3d 197 (1st Cir. 1998); Public Service Co. of New Hampshire v. Patch, 167 F.3d 15 (1st Cir. 1998). This appeal concerns the agreement settling these lawsuits.

On April 19, 2000, after thirty-three days of hearings, the PUC initially approved the settlement agreement, conditioned upon the parties' acceptance of certain modifications. Numerous parties to the proceeding, including the petitioners, filed motions for clarification and/or rehearing.

Effective June 12, 2000, the legislature enacted Laws 2000, chapter 249, which provides that, with some modifications, the April 19th order is in the public interest and which authorizes the PUC to approve a finance order implementing the modified agreement. See RSA 369-B:1, VII, IX (Supp. 2000); RSA 369-B:3, I (Supp. 2000).

The PUC then directed the settling parties to file a revised settlement agreement, incorporating the legislatively required changes. The PUC also directed parties that had moved for

clarification or rehearing to file statements regarding the effect of the revised settlement agreement or the legislation on their motions. PSNH filed the revised settlement agreement on June 23, 2000. The PUC issued an order approving the revised settlement agreement and denying the petitioners' requests for rehearing on September 8, 2000. This appeal followed.

As a threshold matter, we address PSNH's assertion that the petitioners may not appeal the PUC's September 8th order because they neither responded to the PUC's June 12th directive nor requested rehearing upon all the grounds they now assert on appeal. We disagree.

"To appeal a decision or order of the PUC, one must first file a motion for rehearing with the PUC stating fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." Appeal of Richards, 134 N.H. at 154, 590 A.2d at 590 (quotation omitted); see RSA 541:4 (1997). Upon denial of the motion for rehearing, the party may then appeal by petition to this court. See RSA 541:6 (1997).

The petitioners have generally complied with this statutory scheme. In response to the PUC's April 19th order, the petitioners timely moved for rehearing. The PUC denied these motions in its September 8th order, and the petitioners then timely appealed to this court. We address separately whether the petitioners have preserved all of their appellate arguments in the discussion that follows.

On appeal, the petitioners contend that the PUC erred by approving the agreement because it unlawfully permits PSNH to recover "stranded costs" from ratepayers.

"A party seeking to set aside or vacate an order of the PUC has the burden of demonstrating that the order is contrary to law or, by a clear preponderance of the evidence, that the order is

unjust or unreasonable. In addition, findings of fact by the PUC are presumed lawful and reasonable." Appeal of Campaign for Ratepayers Rights, 142 N.H. 629, 630, 706 A.2d 675, 677 (1998) (quotation omitted); see RSA 541:13 (1997). "When . . . we are reviewing agency orders which seek to balance competing economic interests . . . our responsibility is not to supplant the [PUC]'s balance of interests with one more nearly to our liking." Appeal of Conservation Law Foundation, 127 N.H. 606, 616, 507 A.2d 652, 659 (1986) (quotation, ellipses, and brackets omitted). We give the PUC's policy choices considerable deference. See id.

The settlement agreement defines "stranded costs" as

> [c]osts, liabilities, and investments that PSNH would reasonably expect to recover if the existing regulatory structure with retail rates for the bundled provision of electric service continued, but which would likely not be recovered as a result of restructuring of the electric industry that allows retail choice of electricity suppliers unless a specific mechanism for such cost recovery is provided.

See also RSA 374-F:2, IV (Supp. 2000). Thus, what makes these costs "stranded" is the deregulation of generation services. See Transmission Access Policy Study Group v. F.E.R.C., 225 F.3d 667, 699, 708 (D.C. Cir. 2000). Absent deregulation, PSNH would likely recover these costs through its rates. See id. at 707.

The agreement permits PSNH to recover stranded costs that consist of: (1) securitized assets; (2) "the net of ongoing expenses and/or revenue requirements (including decommissioning costs) for any generating [asset] that has not been sold or otherwise divested as of Competition Day"; and (3)

non-securitized stranded costs. Competition Day is the date upon which all PSNH retail customers will be able to choose a competitive energy supplier.

The agreement requires PSNH to write off nearly $400 million of its stranded costs. In this way, the agreement requires PSNH's investors to bear a portion of its stranded costs. The agreement also permits PSNH to recover some of its stranded costs from customers by permitting it to charge them a stranded cost recovery charge as part of its unbundled delivery service. The agreement provides that the average level of the stranded cost recovery charge will be 3.40 cents per kilowatt-hour from Competition Day until the earlier of either the date upon which the non-securitized stranded costs are fully amortized or the Recovery End Date (October 31, 2007, or earlier, if certain events occur).

I. Constitutional Claims

The petitioners assert that the stranded cost recovery charge is an unconstitutional "taking." See N.H. CONST. pt. I, art. 12. However, a constitutional argument, in this context, cannot be sustained unless the claim is that the entire rate is either unjust or unreasonable. A utility rate is constitutionally permissible if it is "just and reasonable." Petition of Public Serv. Co. of N.H., 130 N.H. at 274, 539 A.2d at 268. "A just and reasonable rate is one that, after consideration of the relevant competing interests, falls within the zone of reasonableness between confiscation of utility property or investment interests and ratepayer exploitation." Id.

The petitioners do not contend that the entire rate is unjust and unreasonable. Rather, they focus upon one aspect of the rate, the stranded cost recovery charge. Such a piecemeal approach is impermissible. "[T]he constitution is only concerned with the end result of a rate order; i.e., that it be just and reasonable. . . .

[T]he particular ratemaking methodology employed by the regulatory agency is, for the most part, constitutionally irrelevant." Id. at 275, 539 A.2d at 268; see also Duquesne Light Co. v. Barasch, 488 U.S. 299, 313 (1989).

"Since [the petitioners] neither argue nor demonstrate that the total effect of the rate . . . is unjust or unreasonable, we hold that they have failed to sustain their burden of proof to show that the PUC's decision approving the rate . . . was unlawful or unreasonable." Appeal of Richards, 134 N.H. at 165, 590 A.2d at 596. In fact, it appears that the overall effect of the rate is well within the zone of reasonableness. Average rates under the agreement are projected to be approximately fifteen percent lower than they are now.

The petitioners next argue that including the stranded cost recovery charge is unconstitutional because it violates the "used and useful" principle of ratemaking. The "used and useful" principle requires that only property that is "used and useful in the generation of electricity" be included in a utility's rate base. Id. at 160, 590 A.2d at 593 (quotation omitted). This principle is not constitutionally mandated. Petition of Public Serv. Co. of N.H., 130 N.H. at 279, 539 A.2d at 271. Thus, even were we to agree that the stranded cost recovery charge is associated with property that is no longer "used and useful," the PUC's decision to include this property in PSNH's rate base is not unconstitutional.

As part of its "used and useful" argument, GST asserts that because the stranded cost recovery charge constitutes payment for past investment in generation assets, it is unconstitutional. We disagree. "To some degree, all utility rates reflect past costs; utilities typically expend funds today (for example, constructing generation facilities), fully expecting to recover these costs through future rates. In fact, current rates often include past costs that utilities deferred in order to avoid rate increases."

Transmission Access Policy Study Group, 225 F.3d at 708.

CRR also argues that the rates set in the agreement are impermissible because, as of Competition Day, PSNH will no longer have a monopoly on generation service and the PUC has no jurisdiction to set rates in the absence of a monopoly. The PUC's regulatory authority is not, however, limited to monopolies. See Appeal of Atlantic Connections, 135 N.H. 510, 514, 608 A.2d 861, 864-65 (1992).

As part of this argument, CRR contends that the PUC's approval of the settlement agreement violates the constitutional right to free and fair competition. See N.H. CONST. pt. II, art. 83. CRR, however, did not make this argument in its motion for rehearing. Thus, it is not preserved for our review on appeal. See Appeal of Atlantic Connections, 135 N.H. at 515, 608 A.2d at 865.

GST argues that including "deferrals created by below-cost pricing of transition service" in the stranded cost recovery charge also violates the constitutional right to free and fair competition. GST also did not include this claim in its motions for rehearing and has not preserved it for our review on appeal. See id. The petitioners' remaining constitutional claims lack merit and warrant no further discussion. See Vogel v. Vogel, 137 N.H. 321, 322, 627 A.2d 595, 596 (1993).

II. Statutory Claims

A. RSA Chapter 374

GST argues that the PUC's order violates RSA chapter 374-F. We disagree.

Without specific reference to the record, GST asserts that as a result of the stranded cost recovery charge, "New Hampshire rates will stay high above [New England] regional rates." GST

argues that this violates RSA 374-F:3, XI, which requires rates "[t]o the greatest extent practicable, . . . [to] approach competitive regional electrical rates." To the contrary, the record suggests that, after deregulation, average rates will be lower than they would have been absent deregulation, and will not only approach average regional rates, but may fall below them.

GST next argues that the agreement violates RSA 374-F:3, XII(d) (Supp. 2000), which requires that stranded costs be "reconciled to actual electricity market conditions from time to time," because it fixes the average stranded cost recovery charge for a period of time. As the State notes in its brief, the agreement, however, provides for periodic reconciliation of stranded costs consistent with RSA 374-F:3, XII(d).

GST next asserts that the stranded cost recovery charge is "discriminatory" because residential customers will pay stranded cost recovery charges that are seventeen percent higher than industrial customers will pay. GST contends that this violates RSA 374-F:3, XII(d), which requires stranded cost recovery to be accomplished through a "nondiscriminatory" charge that is "fair to all customer classes." GST also contends that it violates RSA 374-F:3, VI (Supp. 2000), which requires that the restructuring of the electric utility industry be implemented "in a manner that benefits all consumers equitably and does not benefit one customer class to the detriment of another" and that "[c]osts should not be shifted unfairly among customers."

GST points to no fact other than this percentage difference to support its conclusion that the stranded cost recovery charge is "discriminatory." This is insufficient. See Transmission Access Policy Study Group, 225 F.3d at 708. "The mere fact of a rate disparity is not enough to constitute unlawful discrimination." Id. (quotation and brackets omitted). Moreover, the legislature

has found that this difference is in the public interest and consistent with RSA 374-F:3, VI. See RSA 369-B:1, X (Supp. 2000). As the legislature explained:

> When [the differences among rate classes in the stranded cost recovery charge] are combined with the differences in the delivery service charge among rate classes, and with the differences in the likely market price of energy among rate classes, the overall total rate reduction is likely to be very close to an equal percentage for all rate classes, which is consistent with the benefits to all customers principle of RSA 374-F:3, VI.

RSA 369-B:1, X. To the extent that the difference conflicts with RSA chapter 374-F, RSA 369-B:1, X controls. See In re N.H.P.U.C., 143 N.H. at 240-41, 722 A.2d at 488.

GST argues that the PUC's finding that the stranded cost recovery charge complies with RSA 374-F:3, XII(d) is unsupported by the record. The PUC, however, set forth at length the record evidence that supports its conclusion.

GST's contention that the PUC was required to undertake a "full-blown cost analysis" to calculate the stranded cost recovery charge is also unavailing. No such cost analysis was required. See RSA 374-F:4, V (Supp. 2000) (permitting PUC to set stranded cost recovery charges in context of adjudicated settlement proceeding).

B. RSA Chapter 378

CRR asserts that the settlement agreement violates RSA 378:18-a, I (Supp. 2000). We disagree.

RSA 378:18-a, I, precludes electric utilities from recovering from their non-special contract customers the difference between the rate afforded special contract customers and the regular tariffed rate, unless the PUC determines that this recovery is "in the public interest and equitable to other ratepayers."

CRR argues that non-special contract customers are paying higher stranded cost recovery charges than they would pay were it not for PSNH's special contracts. CRR points to no evidence to support this assertion. Nor does it point to any evidence that the stranded cost recovery charges paid by non-special contract customers somehow make up for the shortfall caused by the special contract rates. To the extent that CRR claims that the rates set by the agreement make up for this revenue shortfall, its claim is premature. See Appeal of Campaign for Ratepayers Rights, 142 N.H. at 632, 706 A.2d at 678. In its order, the PUC refused to adjust the "Company's revenue requirements for alleged shortfalls in receipts associated with Special Contract customers during the initial delivery service period," stating that it will examine this issue in the rate case PSNH must file after the end of the initial period. Cf. RSA 369-B:1, XV.

Affirmed.

BROCK, C.J., and NADEAU and DALIANIS, JJ., concurred.

State of New Hampshire
Supreme Court

APPEAL OF
CAMPAIGN FOR RATEPAYERS RIGHTS
and
NEW HAMPSHIRE PUBLIC INTEREST
RESEARCH GROUP

N.H. Sup. Ct.
No. 2000-637

MOTION FOR CERTIFICATE

NOW COMES the Campaign for Ratepayers Rights (CRR) and New Hampshire Public Interest Research Group (NHPIRG), by and through their attorney, Joshua L. Gordon, and respectfully request this honorable court to issue a certificate noting that federal questions were preserved and determined in this case.

As grounds it is stated:

1. On January 16, 2001, this court released its opinion in *Appeal of Campaign for Ratepayers Rights, &a.* As this Court may be aware, CRR and NHPIRG plan an appeal to the United States Supreme Court. Their Petition for Writ of Certiorari is probably due on April 16, 2001. U.S. SUP. CT. R. 13(3).

2. The United States Supreme Court has jurisdiction only in the presence of a federal question, which is often apparent from the body of the decision being appealed. If the

federal question is not specifically addressed by the state court, however, the petitioner is called upon to demonstrate that it was properly and timely raised. *See* Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE 132 (7th ed. 1993) (attached to this motion is a copy of relevant pages of that book). The method for doing so is by obtaining a certificate from the state court to the effect that the federal question was raised and decided. *Id.*

3. Generally a litigant must follow state procedures for raising the federal question. *Id.* at 123. But "the decisive consideration is whether the record as a whole shows, either expressly or by clear intendment, that the federal claim was 'brought to the attention of the state court with fair precision and in due time.'" *Id.* at 123 (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)).

4. In this Court's written opinion, this Court cited the New Hampshire Constitution, part I, article 12, and also United States Supreme Court cases involving takings under the federal constitution. This Court did not, however, anywhere cite the federal constitution. *Appeal of Campaign for Ratepayers Rights, &a.* __ N.H. __, slip. op. at 4-5 (Jan. 16, 2001). Thus, for the purposes of United States Supreme Court review, it may be regarded as ambiguous whether the federal question was preserved.

5. It is apparent of the face of the record, however, that CRR, NHPIRG, and the Granite State Taxpayers Association (GST) at all relevant times pressed their takings claim pursuant to the United States as well as New Hampshire Constitutions.

> A. In the Public Utilities Commission proceedings which gave rise to this Court's opinion, the United States Constitution was explicitly relied on. In CRR's, NHPIRG's, and GST's Motion for Rehearing filed in the PUC, they wrote,

> The New Hampshire and federal constitutions prohibit taking private property without payment for it. N.H. CONST., pt. I, art. 2; N.H. CONST., pt. I, art. 12; U.S. CONST., amd. 5; U.S. CONST., amd. 14.

MOTION FOR REHEARING, *Petition for Appeal* at 27.[1] They also cited *Missouri Pac. Ry. V. Nebraska*, 164 U.S. 403, 4167 (1896), and included the parenthetical to that case:

> The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of Amendment of the Constitution of the United States.

MOTION FOR REHEARING, *Petition for Appeal* at 27. Further on in their Motion for Rehearing, CRR, NHPIRG, and GST cited United States Supreme Court takings precedent. They wrote,

> If a charge on a consumer's utility bill is for a purpose other than a utility purpose, the charge is an unconstitutional taking. *Denver Union Stock Yard Co. v. United States,* 304 U.S. 470, 475 (1986).

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[1]All record citations herein refer to portions of the record in *Appeal of Campaign for Ratepayers Rights, &a.*, Nos. 2000-637/638 (decided Jan. 16, 2001), and are not attached to this motion as they are already on file with this Court.

MOTION FOR REHEARING, *Petition for Appeal* at 36.

B. In their Petition for Appeal to this Court, the United States Constitution was prominently cited by CRR and NHPIRG. New Hampshire Supreme Court Rule 10 requires that the appellant "[s]pecify the provisions of the constitutions . . . involved in the case." N.H. SUP. CT. R. 10(d). In conformity with that rule, in section D of the Petition for Appeal, CRR and NHPIRG cited "U.S. Const. amds. 5 & 14." *Petition for Appeal* at 4.

C. In GST's Petition for Appeal to this Court, question 4 asks, "Are stranded cost charges an unconstitutional 'taking' because they are for a private, not a public, purpose?" Question 5 asks, "Are stranded cost charges an unconstitutional 'taking' because they have not been found to be used and useful?" *GST Petition for Appeal.*

D. In their brief, CRR and NHPIRG explicitly relied on the federal constitution. In the questions presented, question 1 asks,

> "Does the stranded cost recovery charge which the Public Utilities Commission imposed on customers' bills work an unconstitutional taking of ratepayers' property?"

CRR/NHPIRG Brief at 1. At the beginning of the brief, CRR and NHPIRG wrote,

> A taking is easily defined. It is "a law that takes property from A. and gives it to B." *Calder v. Bull*, 3 U.S. 386, 388 (1798). Our constitutions' takings clauses are "designed to bar

> Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
>
> The New Hampshire and federal constitutions prohibit taking private property without payment for it. N.H. CONST., pt. I, art. 2; N.H. CONST., pt. I, art. 12; U.S. CONST., amd. 5; U.S. CONST., amd. 14. When there is a taking without payment, it violates constitutional due process also contained in the provisions cited. *Missouri Pac. Ry v. Nebraska*, 164 U.S. 403, 417 (1896); *Eyers Woolen Co. v. Gilsum*, 84 N.H. 1 (1929).

CRR/NHPIRG Brief at 11. In these paragraphs, takings is defined with quotation from federal cases. The second sentence cites our "constitutions' takings clauses" – an unmistakable plural – thus referring to both the federal and state constitutions. The second paragraph explicitly mentions both the "New Hampshire and federal constitutions," and explicitly provides citation to both. The final sentence refers to both constitutions, and provides further citation to a federal takings case.

E. In its brief GST also explicitly relied on the federal constitution. As suggested by this Court's rules, GST's brief sets forth the full text of the 5th amendment to the United States Constitution. *GST Brief* at vii. In addition, GST wrote in its brief,

> What <u>does</u> rise to the level of

> constitutional concern is whether the funding of this bailout by PSNH's future ratepayers takes their money – and therefore their property – for a "public use" within the meaning of the N.H. CONST., pt. 1 art 12 and/or U.S. CONST., amd. 5 (as made applicable to the state through amd. 14.)

GST Brief at 14. Further, GST wrote in its brief,

> In addition to requiring a public use, N.H. CONST., pt 1, art 12 requires that any taking be redressed by "just compensation." U.S. CONST. amd. 5 requires the same.

GST Brief at 16.

F. PSNH, the opponent, in its brief makes numerous explicit references to the federal constitution, and certainly nowhere does it imply that the litigation somehow excludes the federal takings issue. In its brief PSNH wrote that "the Appellants' 'taking' arguments rest on erroneous interpretations of . . . the protections afforded by the State and U.S. Constitutions." *PSNH Brief* at 28. PSNH wrote,

> Part I, Article 12 of the N.H. Constitution and the Fourteenth Amendment to te U.S. Constitution guarantee that no governmental "taking" of private property may occur without payment of just compensation."

PSNH Brief at 29. PSNH goes on to make its argument against takings "[p]ursuant to both constitutions," and cites United States Supreme Court cases. *Id.* Probably

presaging what this Court ultimately did in its decision, PSNH wrote,

> Because this Court's decisions involving the N.H. Constitution frequently apply the standards set forth in decisions interpreting the U.S. Constitution, the Appellants' 'taking' arguments under both constitutions can be rejected without separate analysis.

PSNH Brief at 29. In the remainder of PSNH's takings argument on the pages following these quotations, the United States Constitution and United States Supreme Court takings cases are repeatedly cited. It is thus undeniable that PSNH believed it was litigating federal takings law.

G. Similarly, while the State's brief does not cite any constitutional takings provision – state or federal – it nonetheless cites United States Supreme Court takings law. *State's Brief* at 37.

6. It is expected that both the State and PSNH will object to this pleading. They will probably note that in the questions presented by CRR's and NHPIRG's Petition for Appeal, there is no mention of the United States Constitution. That, however, does not impact preservation under New Hampshire law. *LaVallie v. Simplex Wire & Cable Co.*, 135 N.H. 692, 687 (1992) (constitutional issue preserved because it was raised in motion for reconsideration in lower tribunal, "thus giving the trial court an opportunity to consider any error," and because "the language of the [appellant's] questions in his notice of appeal is broad enough to encompass his constitutional claims"); *c.f. In re Brittany L.* 144 N.H. 139, 141 (1999) (due process issue not preserved because notice of appeal "refers specifically to only one constitutional issue, his

'right to confront witnesses against him' and cites no due process cases to support his position"); *Raudonis v. Ins. Co. of North America*, 137 N.H. 57, 60 (1993) (issue not preserved because it was not presented to tribunal below).

7. In CRR's and NHPIRG's case, the federal constitution takings issue was presented to the PUC, was boldly mentioned in the appeal document in this court, was fully brief by CRR and NHPIRG, and was specifically countered by PSNH and implicitly by the State.

8. Given all the references to CRR's and NHPIRG's "clear intendment" to rely on the federal constitution by its repeated mention and citation throughout every relevant document associated with this case, it is not possible for PSNH and the State to maintain that the issue was not presented to this Court. PSNH and the State have entered an agreement which is of at least questionable constitutional validity and they understandably wish to avoid further judicial review. But this court should not acquiesce in their timidity.

9. Despite no mention of the federal constitution in this Court's opinion, it did nonetheless decide a federal question. This Court should therefore issue a certificate in conformity with United States Supreme Court procedure that the federal question was decided.

10. Several United States Supreme Court cases contain the language of the certificates issued by state courts in this situation. Accordingly, the authors of the leading United States Supreme Court procedural reference have included two sample forms. Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE 824 (7th ed. 1993) (copy attached).

11. Counsel here has taken the liberty of adapting the sample forms to this case, and providing proposed language of a certificate that this Court's might issue.

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, that is, CRR and NHPIRG argued that the stranded cost recovery charge imposed on customers of electricity in New Hampshire was a taking of their property in violation of the Fifth and Fourteenth Amendments. The New Hampshire Supreme Court determined the question adversely to their position."

12. Because it is anticipated that such a certificate will not issue from this Court before the deadline for filing a writ of certiorari in the United States Supreme Court, a copy of this motion will be attached to the writ of certiorari, and this Court's certificate, upon issuance, will be forwarded to the United States Supreme Court in accordance with its procedures.

WHEREFORE, the Campaign for Ratepayers Rights and the New Hampshire Public Interest Research Group respectfully request this honorable Court to issue a certificate noting that the federal takings question was presented and decided in this case.

Respectfully submitted for
Campaign for Ratepayers Rights, and
N.H. Public Interest Research Group,
by their attorney,

April 11, 2001

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